BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHARON FRANSON Claimant VS. **LANDIS & GYR POWERS** Respondent AND **ZURICH INSURANCE COMPANY** Insurance Carrier	)	Docket No. 199,630

ORDER

Respondent appeals from a Preliminary Hearing Order of June 26, 1995, wherein Administrative Law Judge Robert H. Foerschler found claimant had suffered accidental injury arising out of and in the course of her employment on the date alleged.

ISSUES

Whether claimant met with personal injury by accident arising out of and in the course of her employment on the date alleged.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds as follows:

The Appeals Board finds the above issue is one enumerated in K.S.A. 44-534a as appealable from a preliminary hearing order and as such said issue is properly before this Appeals Board.

Claimant, an employee of the respondent with responsibilities of unlocking the back door of the respondent's business, slipped on March 8, 1995, in the parking lot behind respondent's business, landing on her left elbow, ankle and knee. The slip and fall occurred when the parking lot was covered with snow and ice. Claimant was walking to the building with key in hand and was approximately twenty to twenty-five (20 to 25) feet from the business at the time of the fall. Claimant acknowledges and respondent's evidence supports the fact that the parking lot was neither maintained nor owned by

respondent. It was instead a common area utilized by all members of the strip-mall in which the business was located. Claimant did testify that the slip and fall occurred directly behind the respondent's business, a location normally used by respondent's employees and customers.

K.S.A. 44-501 and K.S.A. 44-508(g) make it the claimant's burden of proof to show, by a preponderance of the credible evidence, her right to an award by proving all of the various conditions upon which her recovery depends. See also Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

Key to this decision is whether claimant slipped and fell while in her employer's service or while going to or coming from claimant's employment. K.S.A. 44-508(f) states in part:

> "The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer."

Claimant alleges the parking lot, located behind the respondent's business, while not owned or maintained by respondent, could be seen as a part of respondent's premises. Claimant also asserts this parking lot is the only available route to or from work in back of the mall, and it involves a special risk or hazard on a route not generally used by the public except in dealings with the employer.

These issues were considered and discussed extensively in Thompson v. Law Offices of Alan Joseph, 256 Kan. 36, 883 P.2d 768 (1994). In Thompson the claimant, while exiting from an elevator into a public hallway, fell and was injured. There were two offices off the hallway, one of which was the premises of the respondent employer of the claimant. Neither the claimant in Thompson, nor the claimant in this matter, argue that the injuries were the proximate cause of the employer's negligence. The claimant in the instant case does argue that the route being used was a route regularly used only by customers and employees of the respondent.

Thompson cites Larson's regarding the general "premises rules" with respect to parking lots:

> "As to parking lots owned by the employer, or maintained by the employer for his employees, practically all jurisdictions now consider them part of the 'premises,' whether within the main company premises or separated from it. This rule is by no means confined to parking lots owned, controlled, or maintained by the employer. The doctrine has been applied when the lot, although not owned by the employer, was exclusively used, or used with the owner's special permission, or just used, by the employees of the employer." 1 Larson's Workmen's Compensation Law § 15.42(a), pp. 4-104 to 4-121; Thompson, *supra* at 42.

In the case at bar, while the parking lot was utilized by respondent's employees and customers, there is no evidence to show that it was exclusively used and/or controlled by only respondent employees and customers. The parking lot was regularly utilized by members of the general public in passing behind the mall.

The Court in Thompson found it significant that there was no employer control to the right of ingress to and egress from the elevator onto the floor of the office building where claimant was injured. Likewise, in this instance, respondent has no control over claimant's choice of using the back parking lot. Claimant testified several spaces were available in the front of respondent's building for parking and claimant was at liberty to use the available parking space in either location.

The Supreme Court in Thompson also went on to note that it had repeatedly refused to adopt a "proximity" or "zone of employment" rule. Id. at 46. The Court has also rejected employee claims where they merely allege substantial sufficient contact with the employer's premises at the time of the injury. In earlier decisions, the Court denied compensation for an injury occurring in an alley running through the employers parking lot. See Murray v. Ludowici-Celadon Co., 181 Kan. 556, 313 P.2d 728 (1957). The Court also denied benefits when the injury occurred on the sidewalk in front of the employer's business. See Madison v. Key Work Clothes, 182 Kan. 186, 318 P.2d 991 (1957). Likewise, in Walker v. Tobin Construction Co., 193 Kan. 701, 396 P.2d 301 (1964), the employee was injured on a public street in front of the employer's premises and, again, the Court refused to award compensation.

The Court's rationale is that while "going and coming" to and from work the employee is only subject to the same risks or hazards as those to which the general public is subject. These risks are not causally related to the employment. However, once the employee reaches the premises of the employer, the risk to which the employee is subjected has a causal connection to the employment and an injury sustained on the premises is compensable even if the employee has not yet begun work. Thus the "premises" rule is an exception to the "going and coming" rule. Thompson *supra* at 46.

In the instant case, however, the claimant had not yet arrived at her employer's premises and the Appeals Board finds no special risk or hazard exists to overcome the limitations of K.S.A. 44-508(f).

The Appeals Board finds claimant did not suffer personal injury by accident arising out of and in the course of her employment and, as such, the Order of Administrative Law Judge Robert H. Foerschler should be reversed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Robert H. Foerschler of June 26, 1995, should be and hereby is reversed and claimant is denied benefits for the injury on March 8, 1995.

IT IS SO ORDERED.

Dated this ____ day of October, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Keith L. Mark, Mission, Kansas
Wade A. Dorothy, Lenexa, Kansas
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director